

No. 45202-2-II

COURT OF APPEALS, DIVISION II,
FOR THE STATE OF WASHINGTON

BEATRIX RUFFIER and ROBERT RUFFIER, husband and wife,

Appellants/Cross-Respondents,

v.

BRETT HAYFIELD, and KATHY DAVIS-HAYFIELD,

Respondents/Cross-Appellants.

BRIEF OF APPELLANTS/CROSS-RESPONDENTS RUFFIER

Gregory S. Worden, WSBA #24262
Emmelyn M. Hart, WSBA #28820
Lewis Brisbois Bisgaard & Smith LLP
2101 4th Ave., Suite 700
Seattle, WA 98121
(206) 436-2020
Attorneys for Appellants/Cross-Respondents
Beatrix and Robert Ruffier

ORIGINAL

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Table of Authorities | ii-iv |
| I. INTRODUCTION | 1 |
| II. COUNTERSTATEMENT OF THE ISSUE..... | 2 |
| III. COUNTERSTATEMENT OF THE CASE..... | 3 |
| IV. SUMMARY OF THE ARGUMENT | 6 |
| V. ARGUMENT..... | 7 |
| (1) <u>Standard of Review and Principles of Statutory Construction</u> | 7 |
| (2) <u>The Trial Court Properly Declined to Award Attorney Fees to the Hayfields</u> | 10 |
| (3) <u>The Ruffiers Are Entitled to Attorney Fees and Costs on Appeal; the Hayfields Are Not</u> | 18 |
| VI. CONCLUSION..... | 18 |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

| | |
|--|--------|
| <i>AllianceOne Receivables Management, Inc. v. Lewis</i> , ____ Wn.2d ____, ____ P.3d. ____ (2014) | 7 |
| <i>Amren v. City of Kalama</i> , 131 Wn.2d 25, 929 P.2d 389 (1997) | 16 |
| <i>Arborwood Idaho, LLC v. City of Kennewick</i> , 151 Wn.2d 359, 89 P.3d 217 (2004) | 8 |
| <i>Boeing Co. v. Heidy</i> , 147 Wn.2d 78, 51 P.3d 793 (2002) | 9 |
| <i>Brand v. Dep't of Labor & Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999) | 9, 16 |
| <i>Bremerton Pub. Safety Ass'n v. City of Bremerton</i> , 104 Wn. App. 226, 15 P.3d 688 (2001) | 8 |
| <i>Brenner v. Leake</i> , 46 Wn. App. 852, 732 P.2d 1031 (1987) | 11 |
| <i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001) | 8 |
| <i>Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.</i> , 159 Wn.2d 292, 149 P.3d 666 (2006) | 10, 12 |
| <i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002) | 8 |
| <i>Durland v. San Juan County</i> , 174 Wn. App. 1, 298 P.3d 757 (2012) | 8 |
| <i>Featherstone v. Dessert</i> , 173 Wash. 264, 22 P.2d 1050 (1933) | 12 |
| <i>In re C.A.M.A.</i> , 154 Wn.2d 52, 109 P.3d 405 (2005) | 13 |
| <i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004) | 13 |
| <i>In re Impoundment of Chevrolet Truck</i> , 148 Wn.2d 145, 60 P.3d 53 (2002) | 10 |
| <i>In re Santore</i> , 28 Wn. App. 319, 623 P.2d 702, <i>review denied</i> 95 Wn.2d 1019 (1981) | 17 |
| <i>Jametsky v. Rodney A.</i> , 179 Wn.2d 756, 317 P.3d 1003 (2014) | 8 |
| <i>Keystone Masonry, Inc. v. Garco Constr., Inc.</i> , 135 Wn. App. 927, 147 P.3d 610 (2006) | 7 |
| <i>King County v. Sheehan</i> , 114 Wn. App. 325, 352 n.6, | |

| | |
|---|------------|
| 57 P.3d 307 (2002) | 16 |
| <i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 243 P.3d 1283 (2010) | 8 |
| <i>Mellor v. Chamberlin</i> , 100 Wn.2d 643, 673 P.2d 610 (1983) | 10 |
| <i>Price v. Kitsap Transit</i> , 125 Wn.2d 456, 886 P.2d 556 (1994) | 10 |
| <i>Puget Sound Crab Ass'n v. State</i> , 174 Wn. App. 572, 300 P.3d 448 (2013) | 15 |
| <i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002) | 9 |
| <i>Safeco Ins. Co. of America v. Davis</i> , 44 Wn. App. 161, 721 P.2d 550 (1996) | 11 |
| <i>Singleton v. Frost</i> , 108 Wn.2d 723, 742 P.2d 1224 (1987) | 13, 14, 15 |
| <i>State ex rel. Macri v. City of Bremerton</i> , 8 Wn.2d 93, 111 P.2d 612 (1941) | 10 |
| <i>State v. Broadway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997) | 9 |
| <i>State v. Clausen</i> , 114 Wash. 520, 195 P. 1018 (1921) | 12, 13 |
| <i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004) | 7 |
| <i>State v. Krall</i> , 125 Wn.2d 146, 881 P.2d 1040 (1994) | 15 |
| <i>State v. Miller</i> , 72 Wash. 154, 129 P. 1100 (1913) | 17 |
| <i>State v. Ratliff</i> , 140 Wn. App. 12, 164 P.3d 516 (2007) | 8 |
| <i>State v. Thornton</i> , 119 Wn.2d 578, 835 P.2d 216 (1992) | 8 |
| <i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003) | 7 |
| <i>Yacobellis v. City of Bellingham</i> , 64 Wn. App. 295, 825 P.2d 324 (1992) | 16 |

Statutes

| | |
|-----------------------------|---------------|
| Ch. 19.122 RCW | 1 |
| Ch. 18.27 RCW | 12 |
| RCW 4.24.525(6)(a)(i) | 15 |
| RCW 4.84.330 | 14 |
| RCW 8.25.070 | 15 |
| RCW 18.27.040 | 12 |
| RCW 18.27.040(6) | 12, 13 |
| RCW 19.122.020 | 11 |
| RCW 19.122.030 | 3 |
| RCW 19.122.031 | 3 |
| RCW 19.122.040 | <i>passim</i> |
| RCW 19.122.040(3) | 16 |

| | |
|------------------------|---------------|
| RCW 19.122.040(4)..... | <i>passim</i> |
| RCW 19.122.070 | 16 |
| RCW 49.48.030 | 15 |
| RCW 69.50.505 | 13 |
| RCW 69.50.505(6) | 12, 13 |

Rules and Regulations

| | |
|----------------|-----------|
| RAP 18.1 | 7, 18, 19 |
|----------------|-----------|

Other Authorities

| | |
|--|-----------|
| <i>Black's Law Dictionary</i> (9 th ed. 2009) | 12 |
| <i>Webster's Third New Internat'l Dictionary</i> (3d ed. 1969)..... | 7, 18, 19 |

I. INTRODUCTION

This case involves a largely unremarkable negligence action between the Hayfields and the Ruffiers, neighbors owning adjoining high bank waterfront property in Gig Harbor, Washington overlooking Puget Sound. Its only noteworthy feature is the Hayfields' mistaken conviction that the trial court was required to award them attorney fees and costs as the prevailing party below.

The underlying dispute centers on the Ruffiers' removal in February 2011 of a tree stump located on their property near the boundary they share with the Hayfields. During excavation of the stump, Robert Ruffier accidentally damaged a drain pipe running under both properties along the shared boundary providing storm water drainage for the Hayfields' property. The damage blocked the drain pipe, which caused the Hayfields' basement to flood.

Following a bench trial, the trial court determined the Ruffiers failed to provide the pre-excavation notice required by the Underground Utility Damage Prevention Act, Ch. 19.122 RCW ("Act"), and breached the duty of care owed to the Hayfields to avoid damaging the underground pipe.¹ The trial court awarded the

¹ The issues at trial were limited to proximate cause and reasonable care based on an earlier order from the trial court granting partial summary judgment to the Hayfields. CP 377-80; RP I:40-42 ("RP I" refers to the verbatim report of proceedings from the April 12, 2013 summary judgment hearing).

Hayfields damages of more than \$95,000, but declined to award them attorney fees. The Hayfields now appeal on a limited issue; namely, the trial court's refusal to award them attorney fees as the prevailing party below.²

Nothing in the Hayfield's opening brief should dissuade this Court from affirming the trial court's decision to deny them attorney fees. The trial court correctly read RCW 19.122.040(4), which allows, but does not mandate, an award of fees to the prevailing party in any action brought under RCW 19.122.040. Accordingly, this Court should affirm the trial court and award attorney fees and costs on appeal to the Ruffiers.

II. COUNTERSTATEMENT OF THE ISSUE

The Ruffiers acknowledge the Hayfields' assignment of error, but believe the issue associated with that error is more appropriately formulated as follows:

Did the trial court properly decline to award attorney fees to the prevailing landowners where a fee award under RCW 19.122.040(4) is permissive rather than mandatory and the landowners' damages would have occurred even if their neighbors had provided them with the pre-excavation notice required by the Act?

² The Ruffiers appealed the trial court's judgment, but later moved to dismiss their appeal. Court of Appeals, Division II Commissioner Amanda Bearse granted the motion on February 20, 2014.

III. COUNTERSTATEMENT OF THE CASE

The Hayfields' statement of the case is generally accurate, although more comprehensive than needed to review the narrow issue presented here. But several statements in their recitation deserve comment.

First, the Hayfields make much ado about the Ruffiers' failure to provide the pre-excavation notice required by RCW 19.122.030.³ *See, e.g.*, Br. of Resp'ts/Cross-Appellants at 2, 4. But they neglect to mention that they do not subscribe to the one-call 811 locator service mentioned in the Act and thus would not have received notice of the Ruffiers' planned excavation even if the required

³ RCW 19.122.030 states, in pertinent part:

(1)(a) Unless exempted under RCW 19.122.031, before commencing any excavation, an excavator must mark the boundary of the excavation area with white paint applied on the ground of the worksite, then provide notice of the scheduled commencement of excavation to all facility operators through a one-number locator service.

...

(2) An excavator must provide the notice required by subsection (1) of this section to a one-number locator service not less than two business days and not more than ten business days before the scheduled date for commencement of excavation, unless otherwise agreed by the excavator and facility operators[.]

telephone call had been made. CP 314; RP II:13, 15-16.⁴ Only members subscribing to the locator service are notified when a pre-excavation call is made in compliance with the Act. CP 314. Typically, the entities that subscribe are public utilities like Puget Sound Energy, Washington Natural Gas, and Tacoma Public Utilities. CP 315. Private residential homeowners do not usually subscribe to the fee-based service. CP 315; RP II:12. Moreover, the drain pipe at issue here would not have been marked by *any* subscriber prior to the Ruffiers' excavation because it is privately owned by the Hayfields. CP 315; RP II:15. As the trial court concluded, the required notice would not have prevented the damage that occurred. CP 32.

Second, the Hayfields insinuate throughout their opening brief that the outcome of the Ruffiers' excavation would have been somehow different had they been provided notice as the Act requires. Yet they *concede* that even if the Ruffiers had notified them of the intended excavation, they would not have taken any steps to prevent it or have attempted to locate the drain pipe because they were not aware the pipe even existed. CP 29.

⁴ "RP II" refers to the excerpt of the verbatim report of proceedings for the May 8, 2013 trial, which is the trial testimony of the Ruffiers' underground utility expert Robert Duchemin.

Finally, the Hayfields state “the Ruffiers not only knew the drain pipe existed in 1998, but also that it crossed under the Ruffiers’ property and provided drainage from the Hayfield property.” Br. of Resp’ts/Cross-Appellants at 7. That the Ruffiers knew the pipe existed prior to their excavation work in 2011 does not mean, as the Hayfields seems to suggest, that they knew where it was located underground. Rather, they knew only that it began at the Hayfields’ house, ran somewhere along the boundary line between the properties, and ended in the high bluff at the end of their property. CP 88, 90, 101. In fact, the only portion of the pipe located above-ground is the small section visible only if one crawls down the edge of the bluff. CP 215-16, 218-19, 307. While the Ruffiers knew where the drain pipe began and where it ended, they did not know where it ran in between those points. Robert testified he did not attempt to locate any pipes prior to his excavation work because he was not aware that there were *any* pipes in that location let alone a drain pipe under the specific stump he planned to remove. CP 94, 96. No one, not even the Hayfields, knew exactly where the drain pipe was located underground. CP 29, 260, 261, 315.

IV. SUMMARY OF THE ARGUMENT

RCW 19.122.040(4), the statute at issue here, states: “In any action brought under this section, the prevailing party is entitled to reasonable attorneys’ fees.” But neither the Act nor any Washington authority defines “entitled” as that term is used in RCW 19.122.040(4). Nor does the Act indicate that a definition or standards set forth elsewhere are incorporated into the statute for purposes of defining the term. A fair reading of the plain language of RCW 19.122.040(4) indicates a legislative intent to allow, but not to mandate, an award of attorney fees to the prevailing party in any action brought under RCW 19.122.040.

Where the Legislature intended to mandate the award of attorney fees, it has done so explicitly. It did not do so here; consequently, any award to the prevailing party is permissive. The trial court did not err by declining to award attorney fees to the Hayfields. This Court should affirm.

Despite the well-known canons of statutory interpretation applicable here, the Hayfields argue the trial court abused its discretion by denying them attorney fees. The trial court’s decision was not an abuse of discretion. Based on the record, the trial court had tenable grounds for its decision. This Court should affirm.

The Ruffiers should be awarded attorney fees under RAP 18.1 and RCW 19.122.040(4) as the prevailing party on appeal. Where the Hayfields do not prevail, their request for attorney fees on appeal should be denied.

V. ARGUMENT

(1) Standard of Review and Principles of Statutory Construction

On appeal from a bench trial, this Court reviews conclusions of law *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). It also reviews questions of law *de novo*. *Id.* See also, *AllianceOne Receivables Management, Inc. v. Lewis*, ___ Wn.2d ___, ___ P.3d. ___ (2014) (applying the *de novo* standard of review when a case turns on the interpretation of a statute); *State v. Costich*, 152 Wn.2d 463, 98 P.3d 795 (2004) (engaging in *de novo* review of a purely legal question of statutory interpretation involving a party's entitlement to attorney fees); *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn. App. 927, 936-37, 147 P.3d 610 (2006) (applying *de novo* review where the meaning of an attorney fee statute was at issue).

When a question of law requires the Court to interpret a statute, its fundamental objective is to ascertain and carry out the Legislature's intent. *Arborwood Idaho, LLC v. City of Kennewick*,

151 Wn.2d 359, 367, 89 P.3d 217 (2004); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Statutory interpretation begins with the statute's plain meaning. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). If the statute's meaning is plain on its face, that plain meaning is an expression of Legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The Court cannot add words to an unambiguous statute when the Legislature has not included that language. *Durland v. San Juan County*, 174 Wn. App. 1, 23, 298 P.3d 757 (2012).

This Court discerns the plain meaning of a statute from all that the Legislature has said in the statute and its related statutes that disclose legislative intent about the provision in question. *Jametsky v. Rodney A.*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). It considers the natural and contextual meanings that attach to a term, giving words their usual, ordinary, and commonly accepted meaning. *State v. Ratliff*, 140 Wn. App. 12, 16, 164 P.3d 516 (2007); *Bremerton Pub. Safety Ass'n v. City of Bremerton*, 104 Wn. App. 226, 230-31, 15 P.3d 688 (2001). Plain language does not require construction. *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992).

A fair reading of the language of RCW 19.122.040(4) indicates a legislative intent to allow, but not to mandate, an award of attorney fees to the prevailing party. The Court thus need go no further in analyzing this case.

The Hayfields nevertheless argue the trial court abused its discretion by denying them attorney fees. Br. of Resp'ts/Cross-Appellants at 10, 15. This Court should affirm because the trial court's decision was not an abuse of discretion.

A trial court abuses its discretion only when the exercise of that discretion is manifestly unreasonable or based upon untenable grounds or reasons. *See, e.g., Boeing Co. v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002) (citing *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported; it is based on untenable reasons if it rests on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Here, the trial court had tenable grounds for its decision.

(2) **The Trial Court Properly Declined to Award Attorney Fees to the Hayfields**

The Hayfields contend the trial court erred by denying their request for attorney fees based on the fee provision in RCW 19.122.040. They claim, under RCW 19.122.040(4), that the court did not have discretion to deny them fees. They are mistaken. The statute's plain language does not mandate an award.

Under well-established Washington law, each party in a civil action will pay its own attorney fees and costs. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160, 60 P.3d 53 (2002); *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983). This general rule may only be modified by statute, contract, or recognized ground in equity. *See, e.g., State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113, 111 P.2d 612 (1941). Because statutes authorizing attorney fees are in derogation of the common law, Washington courts construe such statutes narrowly and require a "clear expression of intent from the legislature" authorizing fee awards. *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 303, 149 P.3d 666 (2006) (quoting *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994)). The relevant statutory language here is set forth in RCW 19.122.040(4), which states: "In any action brought under this section, the

prevailing party is entitled to reasonable attorneys' fees."

The Hayfields argue with no authority that they are entitled to recover attorney fees by virtue of the statute's plain language. Br. of Resp'ts/Cross-Appellants at 11. According to the Hayfields, that the statute states a prevailing party "is entitled" to its reasonable attorney fees means an award is mandatory rather than permissive. *Id.* The Ruffiers do not agree the quoted language dictates an award. The question, therefore, is what the Legislature meant by "is entitled." RCW 19.122.040(4). The ordinary and obvious meaning of this language is that the Legislature allowed, but did not mandate, an award.

Neither the Act nor any Washington authority defines "entitled" as that term is used in RCW 19.122.040(4). *See, e.g.,* RCW 19.122.020. Nor does the Act indicate that a definition or standards set forth elsewhere are incorporated into the statute for purposes of defining the term. The legislative history likewise provides no guidance. Accordingly, the Court may resort to extrinsic aids, such as dictionaries, to find the word's ordinary meaning. *Brenner v. Leake*, 46 Wn. App. 852, 854-55, 732 P.2d 1031 (1987). *See also, Safeco Ins. Co. of America v. Davis*, 44 Wn. App. 161, 164, 721 P.2d 550 (1996) (resorting to dictionary

definition of “entitle” where an insurance policy failed to define the term). A legal definition of “entitle” is “[t]o grant a legal right to or qualify for.” *Black’s Law Dictionary* (9th ed. 2009). A more common meaning is to “furnish with proper grounds for seeking or claiming something.” *Webster’s Third New Internat’l Dictionary* (3d ed. 1969).

A primary rule of statutory construction is that the ordinary signification must be applied to words of common use, *see, e.g., State v. Clausen*, 114 Wash. 520, 522, 195 P. 1018 (1921), and these statutory words are to be read according to their natural, ordinary, and popular meaning. *Featherstone v. Dessert*, 173 Wash. 264, 268-69, 22 P.2d 1050 (1933). From this viewpoint and looking only to the phrase “is entitled,” the words should be read as permissive.⁵ Under that plain reading, the Hayfields are

⁵ Two statutes with nearly identical attorney fee provisions are illustrative. RCW 18.27.040(6) allows an award of attorney fees to the prevailing party in an action against a contractor’s bond, stating: “The prevailing party in an action filed under this section . . . is entitled to costs, interest, and reasonable attorneys’ fees.” While the phrase “is entitled” is neither defined in Chapter 18.27 RCW nor in any published Washington decision addressing that statute, an award under RCW 18.27.040, like an award under RCW 19.122.040(4), appears to be permissive rather than mandatory. *Cosmopolitan Eng’g*, 159 Wn.2d at 306 (holding RCW 18.27.040 *authorizes* attorney fees to the prevailing party only in actions against a contractor’s bond) (emphasis added).

RCW 69.50.505(6) similarly states: “In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys’ fees reasonably incurred by the claimant. In addition, in a court hearing between two or more claimants to the article or articles involved,

authorized “to seek” or “to claim” attorney fees, but the trial court is not required to award them. To change or vary the obvious meaning of the phrase “is entitled” would be to usurp the functions of the Legislature. *Clausen*, 114 Wash. at 522. *See also, In re Estate of Black*, 153 Wn.2d 152, 162, 102 P.3d 796 (2004) (holding “explicit and unequivocal” statutes may not be rewritten). This Court shows greater respect for the Legislature by preserving the Legislature’s fundamental role to rewrite the statute rather than undertaking that legislative task itself. *In re C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005).

The Hayfields’ reliance on *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987) to argue the trial court was required to award them attorney fees is misplaced. Br. of Resp’ts/Cross-Appellants at 11. *Singleton* is inapposite and easily distinguishable. There, Shontz loaned Frost money in exchange for a promissory note secured by a deed of trust to a 40-acre parcel of property owned by Frost. *Singleton*, 108 Wn.2d at 724. A year later, Singleton loaned Frost money in exchange for a promissory note

the prevailing party is entitled to a judgment for costs and reasonable attorneys’ fees.” Like RCW 19.122.040(4) and RCW 18.27.040(6), an award under RCW 69.505(6) appears to be permissive. *Guillen v. Contreras*, 169 Wn.2d 769, 780, 238 P.3d 1168 (2010) (holding a claimant *may* recover reasonable attorney fees for any property the government has wrongfully seized under RCW 69.50.505) (emphasis added).

secured by a deed of trust to a 3½-acre parcel of property owned by Frost. *Id.* The next day, Shontz relinquished his interest in the 40-acre parcel in exchange for what he believed would be a first lien position in the 3½-acre parcel. *Id.* at 725. Unbeknownst to Shontz, his lien was recorded one day after the deed of trust in favor of Singleton. *Id.*

Singleton sued to enforce her promissory note and to establish priority over Shontz. *Id.* Shontz cross-claimed against Frost. *Id.* The trial court granted judgment in favor of Singleton and against Frost and granted her lien priority over Shontz. *Id.* The court also found in favor of Shontz as against Frost. *Id.* The court did not award attorney fees to Shontz, although it awarded them to Singleton. *Id.* at 726. Singleton appealed, claiming among other things that the trial court's refusal to award him attorney fees was error. *Id.*

This Court affirmed. *Id.* The Supreme Court accepted review solely on the issue of whether it was within the trial court's discretion to deny Shontz reasonable attorney fees where such fees were specifically provided for in the promissory note. *Id.* at 727. The Supreme Court reversed, holding the fee provision of RCW 4.84.330, which states fees "shall be awarded" to the

prevailing party, mandated an award of reasonable attorney fees to Shontz. *Id.* The trial court's only discretion in light of the Legislature's use of the word "shall" was as to the amount awarded.

The fundamental difference between *Singleton* and this case is that the Legislature did not use the word "shall" when it drafted RCW 19.122.040(4). Where the Legislature intended to mandate the award of attorney fees, it has done so explicitly. *See, e.g.*, RCW 4.24.525(6)(a)(i) (stating the court "shall" award attorney fees to the party who prevails on a motion to strike under the anti-SLAPP statute); RCW 8.25.070 (stating the court "shall" award attorney fees to a condemnee in an eminent domain action); RCW 49.48.030 (stating the court "shall" award reasonable fees to any person who prevails in an action for wages or salary owed). *See also, State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (noting the word "shall" is presumptively imperative); *Puget Sound Crab Ass'n v. State*, 174 Wn. App. 572, 300 P.3d 448 (2013) (noting the word "shall" imposes a mandatory duty). It did not do so here. Accordingly, the trial court was permitted, but not required, to award attorney fees to the Hayfields.

The Hayfields seem to implicitly rely upon an interpretation of RCW 19.122.040(4) that would incorrectly equate an award of

attorney fees with penalties or punitive damages; however, contrary to their assertions, the statute does not mandate that the trial court award fees. In addition, given that a separate provision exists imposing civil penalties on individuals who violate the Act, RCW 19.122.070, and providing damages if an underground facility is damaged, RCW 19.122.040(3), it is clear the Legislature did not intend an attorney fee award to serve a punitive function. The underlying purpose of a statute authorizing an award of attorney fees is central to its calculation. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). When a statute differentiates among the relief it provides, the awards are intended to serve different purposes. *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 304, 825 P.2d 324 (1992), *abrogated in part on other grounds by Amren v. City of Kalama*, 131 Wn.2d 25, 37 n.10, 929 P.2d 389 (1997), and *King County v. Sheehan*, 114 Wn. App. 325, 352 n.6, 57 P.3d 307 (2002).

It is a very well-settled rule in Washington that so long as the language used in a statute is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of this Court to give it force and effect. *State v. Miller*, 72 Wash. 154, 158,

129 P. 1100 (1913). Here, the language of RCW 19.122.040(4) is plain and unambiguous: it allows, but does not mandate, an award of fees to the prevailing party in any action brought under RCW 19.122.040.

Despite these unequivocal standards, the Hayfields argue the trial court abused its discretion by denying them attorney fees. Br. of Resp'ts/Cross-Appellants at 10, 15. The court should still affirm. Based on the record, the trial court had tenable grounds or reasons for its decision and did not abuse its discretion.

In assessing whether the trial court abused its discretion, it is apparent that it correctly understood RCW 19.122.040(4) permitted, but did not require, an award of attorney fees. More to the point, substantial and undisputed evidence supports the trial court's conclusion that the required pre-excavation notice to the Hayfields would not have prevented the damage that occurred. CP 32 (CL 8). The Hayfields had no knowledge of the drain pipe or its location and would not have taken any action to prevent the excavation or have attempted to locate the pipe since they were not aware of its existence. CP 29 (FF 20).⁶ Even if the Ruffiers had complied with

⁶ The Hayfield's failure to assign error to finding of fact 20 renders the findings contained therein verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). See also, *In re Santore*, 28 Wn. App.

the Act by making the required pre-excavation telephone call, the outcome would have remained the same: the Hayfields' drain pipe would have been damaged. CP 32.

This Court should affirm the trial court's decision to deny attorney fees to the Hayfields. The trial court's decision was neither reversible error nor an abuse of discretion.

(3) The Ruffiers Are Entitled to Attorney Fees and Costs on Appeal; the Hayfields Are Not

A prevailing party on appeal is entitled to an award of attorney fees if allowed by contract, statute or common law. RAP 18.1. RCW 19.122.040(4) allows an award of reasonable attorney fees to the prevailing party in any action brought under RCW 19.122.040.

The Ruffiers should be awarded attorney fees and costs under RAP 18.1 and RCW 19.122.040(4) as the prevailing party on appeal. Where the Hayfields do not prevail, their request for attorney fees on appeal should be denied.

VI. CONCLUSION

Where the Legislature intended to mandate the award of attorney fees, it has done so explicitly by unequivocally stating

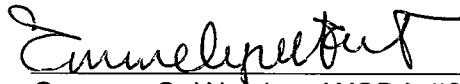
319, 623 P.2d 702, *review denied*, 95 Wn.2d 1019 (1981) (unchallenged findings become the established facts of the case).

attorney fees "shall" be awarded. But it did not draft RCW 19.122.040(4) using such mandatory language. The plain language of RCW 19.122.040(4) allows, but does not mandate, an award of fees to the prevailing party in any action brought under RCW 19.122.040. This Court should affirm the trial court's decision to deny attorney fees to the Hayfields, especially where the required notice would not have prevented the damage that occurred.

The Court should deny the Hayfields' request for attorney fees on appeal and award them instead to the Ruffiers. RAP 18.1; RCW 19.122.040(4).

DATED this 20th day of June, 2014.

Respectfully submitted,



Gregory S. Worden, WSBA #24262
Emmelyn M. Hart, WSBA #28820
Lewis Brisbois Bisgaard & Smith LLP
2101 4th Ave., Suite 700
Seattle, WA 98121
(206) 436-2020
Attorneys for Appellants/Cross-
Respondents Ruffier

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on June 20, 2014 I caused service of the foregoing **Brief of Appellants/Cross-Respondents Ruffier** by U.S. mail, postage prepaid, on the parties listed below:

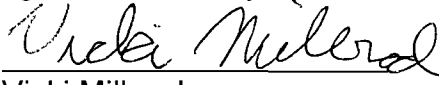
Michael M.K. Hemphill
Roberts Johns & Hemphill, PLLC
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335

Jennifer A. Wing
Law Office of Jennifer A. Wing, PLLC
615 Commerce St, Suite 205
Tacoma, WA 98402-4605

Original sent by e-mail for filing with:
Court of Appeals, Division II
State of Washington
Clerk's Office
E-mail: coa2filings@courts.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed in Seattle, Washington this 20th day of June, 2014.


Vicki Milbrad

COA2 FILINGS
JUN 20 2014
COURT OF APPEALS
DIVISION II
CLERK'S OFFICE
3:50 PM